United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

76-1420

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

- against - :

KENNETH RAYMOND CHIN and :
ELIZABETH JANE YOUNG, now known as
ELIZABETH JANE YOUNG CHIN, :

Defendants-Appellants. :

----------X

On Appeal from the United States
District Court for the Eastern
District of New York

PETITION FOR REHEARING AND REHEARING EN BANC

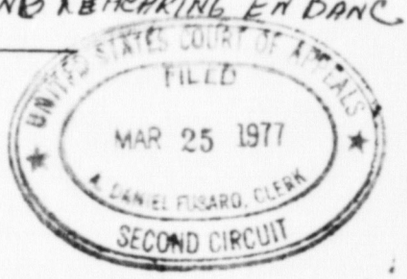

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TABLE OF CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

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PETITION FOR REHEARING

Elizabeth Jane Young Chin [Young] petitions the above-entitled court for a rehearing and a rehearing en banc based upon issues overlooked and/or not considered by this Court's ruling of affirmance of her conviction from the bench on March 21, 1977.

1. Holding there is no valid issue of double jeopardy and/or collateral estoppel which bars the second trial of Ms. Young, this Court places itself in conflict with the holding of the United States Supreme Court in Sealfon v. United States, 332 U.S. 575 (1948) and this Court's own ruling in United States v. Kramer, 289 F.2d 909 (2 Cir., 1961) and the still more recent decision of the Supreme Court in Ashe v. Swensen, 397 U.S. 436 (1970).

Since Ms. Young was acquitted of conspiracy at her first trial she could not be retried on the same issue of joint or agreed action with co-defendant Chin in transporting a weapon without violating the double jeopardy clause of the Fifth Amendment to the Constitution because the same evidence on which a jury had already ruled in her favor was adduced at the second trial.

2. This Court found that the trial court had erred in its instruction with respect to the meaning of the word "residence" in the statute; yet this Court held such error to be "harmless". The prosecution argued that defendant Young had only one residence and that in New York. The defense produced evidence and argued on the basis of other evidence that defendant Young had changed her residence from New York to California and/or had continuously maintained residences in California (as an unmarried Chinese female) and in New York. The trial court's erroneous instruction on this heading -- in conflict with the plain intent of Congress -- had to be decisive to the jury's deliberation on this question and accordingly was not "harmless" error.

3. This Court found, contrary to the evidence in the record, that Judge Mishler below had conducted the trial in a fair and impartial manner. In this connection and in support of this contention that Judge Mishler was unfair and

had prejudged the case against both defendants early in the first trial of Ms. Young and continued to do so thereafter, appellant Young appends a detailed affidavit in support of a motion to recuse Judge Mishler filed with the court below. In the affidavit of Ms. Young dated August 12, 1976, appears carefully documented record references of some of the prejudicial conduct of Judge Mishler throughout the two trials which this Court overlooked in its summary ruling of affirmance. Viz:

"STATE OF NEW YORK)
) Ss.
COUNTY OF NEW YORK)

Elizabeth Jane Young Chin, being duly sworn, deposes and says:

1. I am one of two defendants in the above entitled case. On June 25, 1976, a jury found me guilty of two counts under an eight count indictment charging violation of 18 U.S.C. §922(a)3. It found my husband and co-defendant guilty of four counts under the same indictment and under a statute which prosecribed and make a felony the transportation of a weapon from out of the State of New York into the State of New York if, at the time, the person transporting the weapon is a resident of the State of New York.

2. I make this affidavit in support of a motion to recuse Judge Jacob Mishler, the presiding judge at the trial, as the sentencing judge in the sentencing of both myself and my husband, now scheduled to take place on September 17, 1976.

3. The grounds for my motion will be set forth in particularity below and are based on the provisions of 28 U.S.C. §144. The grounds concern Judge Mishler's demonstrated prejudice against me and my lawyer, Eleanor Jackson Piel -- demonstrated repeatedly in pretrial motions and two subsequent trials. At the first trial, I was the sole defendant. That trial resulted in a hung jury on the substantive count and my acquittal of a conspiracy count under the same law. The second trial proceeded on the same facts as the first trial on a superseding indictment. At that second trial, both my husband and I were convicted of violation of 18 U.S.C. §922(a)3.

4. Although I feel the prejudice of the court is greater toward me, I believe that the court is similarly prejudiced and biased against my husband.

5. This motion to recuse Judge Mishler, as will be demonstrated in detail below, concerns three aspects of prejudice:

A Judge Mishler, more than once, referred to an accusation against both my husband and myself which appeared in New York newspapers on October 5, 1975 (front page of The New York Times and The Daily News) that we threatened the lives of Emperor Hirohito and his Empress. There was not a scintilla of truth to this accusation; nonetheless, the court appeared to give credence to it and has secret information we cannot controvert which may suggest its truth to the court. We cannot wipe these impressions from Judge Mishler's mind. Moreover, the court indicated it gave credence to a mere accusation, unsupported by fact, by specific

reference to a purported attack on Hirohito's life as being our purpose -- murder -- when there was nothing whatsoever to support such a shocking and unjustified accusation.

B. Judge Mishler declared his belief in my guilt repeatedly at the first trial in response to various motions made by my counsel. That belief, thereafter- when I was acquitted by the jury of conspiracy to commit the crime he believed I and my husband had committed, prompted him to act injudiciously at the second trial at each juncture toward me, my counsel, my mother, my husband and his lawyer, and insured our conviction at the second trial.

C. My observation of Judge Mishler on the bench, in the course of pre-trial proceedings and two trials, convinces me that the Judge suffers, apparently, some incompetence in his relationship with women that prompts behavior unbecoming of a judge and which is prejudicial to the cause of a female defendant, especially when that defendant is represented by a female lawyer. Time and again, in the course of the trials, by his demeanor and his words on the record, he acted to demean my attorney on the grounds of her sex and nothing more. Thus, at one point, Judge Mishler said in open court that my lawyer was "like his wife" in her failure to listen to him. See infra. The problem Judge Mishler may have with his wife should have no role in his performance of his public duty. In employing his emotional frustration in that relationship, to demean the lawyer I chose to represent me, he demonstrated an injudicious temperament which makes him unfit to sit in judgment in my case.

6. As set forth in paragraph A. above, I feel that Judge Mishler should not impose sentence on my (and my husband) because the judge is privy to secret information not available to either my counsel or to my husband's counsel.

7. Both our lawyers made pre-trial motions to suppress evidence obtained by a search warrant authorizing a search of our apartment at 925 Union Street, Brooklyn, New York. The search warrant had been issued on the basis of a public affidavit on file and also on the basis of a secret affidavit not filed. Subsequently, some of the information in the search warrant was revealed to our counsel. A portion, however, of that affidavit remains sealed and is still unknown to us and our counsel. Judge Mishler, after reading the secret portion, denied our motion to suppress the evidence seized under the authority of the affidavit and search warrant and I can only conclude that decision was based, in some part, on the contents of the secret portion of that affidavit which must have contained derogatory information about myself and my husband. We have no way of controverting such derogatory information since the contents are sealed.

8. In specific support of this contention, I cite a portion of the record at the first trial. The Judge there, referred to my asserted transportation of weapons into the State of New York as follows:

> "And as I understand, the purpose was murder; isn't that it ...it was to murder Emperor Hirohito..." (I 154,155)*

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* References to the trial transcripts will be made by I and II followed by page number indicating first and second trials respectively.

9. Moreover, at the conclusion of the second trial, Judge Mishler told the jury after verdict:

> "...the Secret Service thought this cache of guns were going to be used to assassinate Hirohito when he came to this country." (II 580)

10. I can state categorically that neither I nor my husband at any time had any thought of any such murder or assassination, nor did we know the Emperor Hirohito was to come to New York; I cannot believe that Judge Mishler with his secret and undisclosed information can put that belief out of his head at the time of our sentence. We could be grievously and seriously prejudiced in that regard without any recourse.

11. In addition to this, Judge Mishler, on many occasions, prior to the case going to the jury, indicated his personal belief that both I an my husband were guilty of both conspiracy to bring weapons into New York where he believed we were at all times residents, or of aiding and abetting each other in violating this portion of the gun law (18 U.S.C. §922(a)3). Judge Mishler repeatedly evidenced his disbelief in any legitimate purpose we may have had to possess weapons and early on decided we were both guilty. Viz:

> The Court: "Does a hunter use hand weapons?" (I 23)...what is a nice lady plumber who is just a hunter got to do with a bomb in her house?" (I 25)*
>
> . . . .
>
> The Court: "Mrs. Piel, in my opinion, the defendant has practically, not actually admitted all the elements of the crime." (I 148)

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* No bomb of any kind was offered in evidence. Government counsel referred to a "smoke bomb", (actually a hunting flare) found in the apartment in colloquy but nothing was before the court in this regard.

The Court: "...if the defendant knew that she had a gun and brought it into the state, that proves the crime."

. . . .

Mrs. Piel: "Your Honor, you're prejudging the case..." (I 149)

. . . .

"But you're suggesting that the defendant already admitted her guilt." (I 150)

. . . .

The Court: "I said the defendant has conceded or practically conceded from what you said, not from what she said, the guns were bought in California. She lived in New York. I wouldn't care whether there was fraud involved or not. She had no right to bring the gun into the state. If she knew she was carrying a gun in that luggage, that was it."

. . . .

The Court: "Without calling it a conspiracy, it's a joint crime." (I 226)

. . . .

"...There is an abundance of evidence that this was a conspiracy entered into between Chin and Young to bring guns into New York in violation of 922(a)3." (I 277)

. . . .

Mrs. Piel: "There is nothing to show that she [Young] conspired to --"

The Court: "Conspired with Chin? There is everything to show it.
"Now we come to the disposition sale. The guns found in the home that is rented by both. He participated in one fashion; she in another; all to accomplish the one crime of bringing the guns into New York." (I 279)

. . . .

The Court: "If I were to make a finding now, I think I'd be compelled to find on the evidence -- and I do for the purpose of this motion -- that either or both Young and Chin carried these guns across the border into New York. If anybody else did it, they did it at their direction; it's their guns!" (I280)

. . . .

The Court: "If this were a non jury question, I'd have no problem in finding conspiracy at all, if you want to know my personal opinion." (I 379)

12. An example of the court's attitude toward the case -- as though the court itself were part of the prosecution side, rather than an impartial arbitrator -- is shown by the following comments made on the issue of whether or not to strike certain evidence concerning one of the weapons at the end of the trial. In the opinion of the court, the evidence was not sufficiently connected to the defendant -- Judge Mishler then said, on the issue of whether to strike such evidence:

> The Court: "...It may well place a guilty verdict in jeopardy -- I think it's a close question... (I 496)
>
> . . . .
>
> "It's not a question of what is fair. I'm talking about what is safe." (I 498)

13. At the second trial, the court referred to favorable rulings for the defense as "bad" news and favorable rulings for the government as "good news". (II 742)

14. It is clear from the foregoing that the court had made up its mind as to the joint guilt of my husband and myself before the jury verdict in the first trial. That verdict, in acquitting me, effectively decided that there was no illegal conspiracy of agreement between my husband and myself. Nonetheless, we were both put to trial on that issue before a second jury on a superseding indictment reciting the same facts.

15. At the second trial, the court appeared to demonstrate a more active hostility toward both me and my counsel to which was added a hostility to my counsel and to me because we are females. At one point, in the first trial, the court turned to my lawyer

and said:

The Court: "...You're like my wife you don't listen." (I 405)

16. At the second trial, the court often referred derogatorily to the sex of my lawyer. Viz:

The Court: "I learned a long time ago not to argue with a woman. You won't get anyplace."(I 138)

17. On another occasion, when Mrs. Piel asked for a brief recess to examine a document the prosecution had just offered in evidence, the court gratuitously demonstrated its hostility to her before the jury responding:

The Court: "I didn't ask for a speech Mrs. Piel. If I wanted one, I would invite one." (II 232)

18. On another occasion, the court, without any provocation whatsoever, asked Mrs. Piel:

The Court: "Has any other judge ever told you that you argue at length on total irrelevancies? Has anybody else ever said that, or am I the first one?"

. . . .

"...Sometimes, I wonder whether I'm just getting too old for this, when I just can't sit by and stand for this." (II 573)

19. During her summation, the court reprimanded Mrs. Piel in a manner I thought rude and prejudicial to my case. He then, in the middle of the summation, excused the jury and threatened her with contempt of court. Moreover, Judge Mishler told my lawyer that she had no right to refer to either me or my husband as law-abiding citizens (II 679-680). I cannot understand this, since before this case, neither my husband nor I were ever con-

victed of any crime.

20. On another occasion, the court again, without provocation fairly shouted at Mrs. Piel:

> The Court: "God, I wish that you would keep quiet at times." (II 594)

21. The court was particularly unreasonable on the issue of ordering the return of a government witness at the request of my lawyer. Initially, the court had announced that it would permit the recall of a witness on request of counsel (II 307). When my lawyer made a request that a government witness return, the court required that the witness be formally subpoenaed a second time and paid a second subpoena fee (II 351, 357, 358). The colloquy which followed this, in my opinion, demonstrated a deep hostility toward my counsel, which I feel was also a hostility toward me. Viz:

> Mrs. Piel: "I would be very happy with the cooperation of the court and Mr. Grady, to put him on telephone notice. I don't want to waste Mr. Grady's time."
>
> The Court: "You are not making any deals with me, Mrs. Piel.
>
> "I found that everything that has gone on here has been pretty petty and I will not be brought into it.
>
> "You're not going to get me into deals as to how witnesses will be brought back.
>
> "This witness was on the stand, mind you. If you wanted anything of this witness, you could have asked him. But you thought you could get me to direct him to come back even if you were going to ask nothing." (II 358)

Mrs. Piel: "That's very unfair."

The Court: "I know I'm unfair. I see what's happening in this case. If you want him back, pay for it and ask him the same questions you would have asked him today." (II 359)

22. The court also was sarcastic towards me. On one occasion, Judge Mishler characterized me as "just [a] sportsman killing varmints and perhaps helping civilization in the process." (I 286)

23. On another occasion, Judge Mishler excoriated my mother asserting that he had watched her "deny everything that the United States Attorney has said". (I 511) My mother was seated in the courtroom, outside the bar and did not take the stand to testify. The court later softened its attitude when he learned that she did not speak or understand English (I 526).

24. The above demonstrated attitude of the court which showed its prejudice against me and my husband as well as hostility to counsel was summed up by Judge Mishler toward the end of the case when Mr. William Leibowitz, my husband's lawyer, arose to protest the characterization of the court that he [Leibowitz] had been unfair. Said the court to him:

The Court: "I think all three lawyers displayed unfairness in this case to varying degrees and you [Leibowitz] did it too...

"If I had to rank them in order, I'd rank them Mrs. Piel 1, Mr. Levin-Epstein 2; and you [Leibowitz] 3...

"I was brutally frank with Mrs. Piel, the record is shot throught with it (II 749)

"But, I am not going to take back a single work of what I said about unfairness here.

"Mrs. Piel particularly, in just refusing to obey the court's ruling. I think that is outrageous." (II 750)

25. I believe the above described excerpts from the record, taken out of context as they are, demonstrate that Judge Mishler cannot be fair and impartial when it comes time for sentencing either me or my husband. I could not quote nor excerpt all the examples and my feeling is that the overall prejudice of Judge Mishler goes further than even these isolated incidents and demonstration of his feeling.

26. I have read the provisions of 28 U.S.C. 144 and believe that this is an appropriate case for the recusal of Judge Mishler from the sentencing of both my husband and myself.

27. I ask Judge Mishler to read over the record, himself, and to disqualify himself from proceeding further in this case.

/s/

ELIZABETH JANE YOUNG CHIN

CONCLUSION

Based on the foregoing it is requested that this Court grant appellant Young a rehearing and a rehearing en banc.

Dated: March 24, 1977.

Respectfully submitted,

ELEANOR JACKSON PIEL,
Attorney for Appellant Young.

STATE OF NEW YORK)
) Ss.:
COUNTY OF NEW YORK)

Dana Fleetman Barraclough, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 222 East 21st Street, New York, New York 10010. On March 25, 1977, deponent served the within Petition for Rehearing upon David G. Trager, United States Attorney for the Eastern District of New York, at 225 Cadman Plaza East, Brooklyn, New York 11201, the address designed by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dana Fleetman Barraclough

Sworn to before me
this 25th day of March, 1977.

ELEANOR JACKSON PIEL
Notary Public, State of New York
No. 31-0337300
Qualified in New York County
Commission Expires March 30, 1978